

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Before Commissioners: Edward J. Gleiman, Chairman;  
W.H. "Trey" LeBlanc III, Vice Chairman;  
Dana B. Covington, Sr.; Ruth Y. Goldway; and  
George A. Omas

Periodicals Classification Change

Docket No. MC99-3

ORDER GRANTING POSTAL SERVICE MOTION TO PROCEED WITHOUT  
EVIDENTIARY HEARINGS

(May 14, 1999)

*Background.* On April 12, 1999, the Commission issued a Notice and Order on Request for Recommended Decision on Periodicals Classification Change requiring any interested, intervening party who desired a hearing to so request by April 28, 1999. Docket No. MC99-3, PRC Order No. 1237 at 4. Of those parties seeking intervention in this case addressing a Nonprofit rate anomaly, only the National Federation of Nonprofits (NFN) requested a hearing. Request of the National Federation of Nonprofits for Permission to Intervene, and Request for a Hearing (NFN Request) at 1. NFN contended that the Postal Service refund procedure to be instituted to address the anomaly should have a retroactive start date of January 10, 1999 (the date new rates went into effect), rather than the Service's chosen date of April 9, 1999 (which corresponds to this case's filing). *Ibid.*

At the May 3, 1999 prehearing conference, NFN reiterated its position, and further indicated interest in cross-examination of Postal Service witness Taufique, as well as presentation of a direct case. Tr. 1/12. The Postal Service opposed NFN's position, arguing that: (1) witness Taufique's testimony is not germane to the only issue raised by NFN- the backdating of the postage refund to January 10, 1999; (2) NFN has

failed to raise a genuine issue of material fact meriting a hearing; and (3) in any event, the relief sought by NFN cannot be granted by the Commission, as it has no jurisdictional authority over operational decisions by Postal Service management — which NFN has conceded — and the matter of refunds fall within this realm.

Tr. 1/15-16.

On May 3, 1999, the Commission issued a ruling which recognized the Postal Service's prehearing conference objection as a motion to proceed without evidentiary hearings in this docket. P.O. Ruling MC99-3/1 at 2. The Commission directed interested participants wishing to respond to this motion to individually address the separate issues of the relevance of cross-examination of Postal Service witness Taufique and the NFN request to present a direct case on the effective date of the proposed postage refunds. *Ibid.* The ruling also certified the motion to the full Commission pursuant to Rule 32, as a matter involving important questions of law and policy. *Id.* at 2-3. The Commission accepts certification.

*Legal Arguments of the Parties.* Three parties responded to the Postal Service Motion — the Office of Consumer Advocate (OCA), the Advertising Mail Marketing Association (AMMA) and NFN. In addition, the Postal Service later filed comments regarding certain aspects of AMMA's "pleading."

With regard to potential cross-examination of Postal Service witness Taufique, all three responding parties essentially agree that Taufique's testimony focusing on the economic impact of the Service proposal is not germane to the issue of the effective date of postage refunds.<sup>1</sup> Response of the National Federation of Nonprofits to

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<sup>1</sup> Although neither OCA nor AMMA directly addresses the relevance of witness Taufique's testimony on the matter, both groups suggest that it is appropriate to dispense with evidentiary hearings *in toto* in this case, albeit for different rationales. Response of the Advertising Mail Marketing Association to Postal Service Motion to Forego Hearings (May 7, 1999) (AMMA Response) at 1; Office of the Consumer Advocate Response to Motion of the United States Postal Service for Expedition and to Forego Hearings as Provided for in P.O. Ruling No. MC99-3/1 (May 7, 1999) (OCA Response) at 7. The OCA generally supports the Postal Service's proposal as conceived, while AMMA characterizes the issue of setting postage refunds retroactive to *January 10, 1999* as a matter of law rather than a factual question. See *generally* OCA Response; AMMA Response at 2.

Commission Ruling on Postal Service Motion for Expedition and to Forego Hearings (May 5, 1999) (NFN Response) at 1. See also OCA Response at 7; AMMA Response at 1. However, NFN maintains that this does not dispense with the need for testimony and cross-examination of a Service witness who is able to discuss the relative costs of processing and delivering Nonprofit and Classroom Periodicals, as compared to Regular rate periodicals. NFN Response at 1-2. While “fully aware” that the Commission recommendations and Board of Governors’ decisions in Docket No. R97-1 “cannot be altered by any action short of Congressional initiative or an omnibus rate case,” NFN proposes that such testimony on the record would reveal that the rates in question are not an anomaly but an error, and arguably would be of benefit in the next omnibus rate proceeding. *Id.* at 2.

On the issue of the Commission’s jurisdictional authority over Postal Service postage refunds, NFN acknowledged at the May 3, 1999 prehearing conference that a recent Commission decision (Life Time Fitness) held that the Commission has no authority to rule on the issue of refunds. Tr. 1/13-14; Life Time Fitness, Docket No. C98-1, Order No. 1227. In its written response NFN maintains that the cited decision does not establish that refunds are beyond the Commission’s jurisdictional scope. NFN Response at 2. Rather, the Life Time Fitness opinion stands for the proposition that the Commission will consider only those complaints which clearly raise an issue as to whether or not rates or services contravene the policies of the Postal Reorganization Act. It is NFN’s position that the Service’s proposed classification change, with its effective postage refund date of April 9, 1999, does contravene those policies, as the Service has already accepted payment of the lower of Nonprofit and Regular rates from at least one (unnamed) mailer prior to the April 9, 1999 date. *Ibid.* This unfair and

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In an earlier intervention, the Alliance of Nonprofit Mailers (ANM) also found no merit for the conduct of evidentiary hearings, instead offering support to the Postal Service proposal as a reasonable temporary fix to a rate problem which requires more fundamental rate structure reform than this docket allows. Notice of Intervention of Alliance of Nonprofit Mailers (April 28, 1999) (ANM Notice of Intervention) at 2.

unequal treatment of some mailers, particularly when compounded with documented evidence that the Service was cognizant of the rate anomaly as early as on or about February 4, 1999,<sup>2</sup> is in direct contravention of the policies of the Act. *Id.* at 3-4. Jurisdiction on the matter thus is squarely placed within the scope of the Commission authority under 39 U.S.C. § 3662. *Ibid.*

AMMA takes a slightly different tack than NFN in its support for the proposition that the Commission is within its jurisdictional authority to recommend refunds retroactive to January 10, 1999. AMMA claims that the Nonprofit rates at issue were and are invalid *ab initio*, as they do not reflect the reduced postage rates for nonprofit mailers that Congress intended, and further contravene the principles underlying section 3626 of title 39. AMMA Response at 2. While acknowledging that under the Postal Reorganization Act the Board of Governors retains exclusive discretion to determine when a rate change will be applied, AMMA maintains that this discretion is predicated on the notion that the rates are valid in the first instance. Thus, as in these “exceptional circumstances” where the rates are invalid *ab initio*, the Commission “can and should at the very least recommend that the Governors apply the refund program retroactively, to the date the invalid rates were first applied, to reverse the effects of the invalid rates.” *Id.* at 3.

Both the OCA and the Postal Service dispute AMMA and NFN’s positions on the issues, and further agree that this docket should proceed expeditiously without unmerited evidentiary hearings. The Postal Service confines its comments to AMMA’s argument. In the first instance, it takes exception to AMMA’s characterization of the rates at issue as invalid *ab initio*.<sup>3</sup> In its May 10, 1999 comments, the Service then

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<sup>2</sup> To this end, NFN cites notification of the rate anomaly to the Postal Service by the Elks Magazine on or about February 4, 1999, as well as February 24, 1999 legislative correspondence addressed to both the Service and the Commission requesting review of the anomaly, and a March 30, 1999 Postal Service conference with interested parties on the issue. NFN Response at 3.

<sup>3</sup> The Postal Service argues that AMMA’s remarks on the Service’s motion to forego evidentiary hearings in this case were actually a pleading wrapped in the clothing of a response. Comments of the United States Postal Service on AMMA Pleading Regarding the Need for Hearings in this Docket (May 10, 1999) (Postal Service Comments) at 1. Accordingly, the Service submits comments in reply.

counters that: (1) no authority is cited for the proposition that the Board of Governors' discretion to select the implementation date for rate and classification changes is based on the notion of valid rates in the first place; (2) there has been no determination by any authority that the rates now disputed were "invalid from the outset;" (3) the Commission has previously held postage refunds as an operational decision of Postal Service management which is beyond the Commission's jurisdictional scope; and (4) in light of the plain language of 39 U.S.C. § 3625(f)<sup>4</sup> and according to relevant case law, the Commission has no authority to include as part of its recommended decision any limitation on the timing of implementation of rates. Comments of the United States Postal Service on AMMA Pleading Regarding the Need for Hearings in this Docket (May 10, 1999) (Postal Service Comments) at 2-3, *citing Governors of U.S. Postal Service v. Postal Rate Commission*, 654 F.2d 108, 115-16 (D.C. Cir. 1981).

The OCA for its part disagrees with NFN's allegation that the indulgence accorded by the Postal Service to a single nonprofit mailer contravenes the policies of the Postal Reorganization Act. OCA Response at 3-4. According to the OCA, this single instance of arguably preferential treatment does not rise to the level of an agency-wide policy deliberately offering special advantages to certain mailers (or certain groups of mailers). *Id.* at 4.

Neither does OCA agree with NFN about the appropriate start date for refunds, nor that the Service was dilatory in filing the instant proceeding to address the rate anomaly. The OCA applauds the Postal Service's efforts to solicit interested parties' comments on the matter prior to filing, and finds the two-month interim period between the Service's first notice of the problem and the date of this docket's filing quite reasonable under these circumstances. *Id.* at 3. Moreover, in light of the Commission's decision in *Life Time Fitness*, the OCA states that "[l]ogic compels the conclusion that if the Commission has no authority to order the Postal Service to make

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<sup>4</sup> Section 3625(f) of 39 United States Code pertains to the Action of the [Board of] Governors and provides that "[t]he Board shall determine the date on which the new rates, fees, the mail classification schedule, and changes in such schedule under this subchapter shall become effective."

any refund, it likewise lacks the authority to order the Postal Service to pay a larger refund than it has determined to be prudent and equitable.” *Ibid.*

On a final note, the Office of Consumer Advocate is sympathetic about NFN’s concern regarding the proper construction of the Revenue Foregone Reform Act, and its interest in the determination of accurate, reliable costs for the preferred and Regular mail subclasses. *Id.* at 4, 6-7. However, OCA does not believe that this limited docket is the proper forum for such investigation. *Id.* at 6-7.

*Commission Analysis.* In the first instance, the Commission commends the interested parties for their thoughtful comments on the issues. As was requested of the participants, the Commission will separately address the discrete issues of the relevance of cross-examination of Postal Service witness Taufique, and the NFN request to present a direct case on the effective date of the proposed postage refunds.

With regard to cross-examination of witness Taufique, the responding parties are in accord that Taufique’s testimony on the economic impact of the Postal Service proposal is not germane to the issue of the effective date of postage refunds. The Commission agrees that under these circumstances witness Taufique’s presence at an evidentiary proceeding in this docket is unnecessary.

Moreover, the Commission does not find a compelling rationale to support hearings on the relative costs of processing and delivering Nonprofit and Classroom Periodicals versus Regular rate Periodicals, as requested by NFN. While conceding that the Commission’s recommendations and Board of Governors’ decisions in Docket No. R97-1 may be changed only by Congressional initiative or an omnibus rate case, NFN submits that Postal Service testimony on the issue may be of benefit in the next omnibus rate case. Other parties such as ANM and the OCA find limited value in this suggestion. The Commission agrees with ANM and OCA that this docket serves a more restricted purpose and is not the appropriate forum for such a potentially lengthy investigation, particularly where it is in all parties’ best interests to achieve a speedy resolution of the rate anomaly and provide nonprofit mailers relief. The Commission expects the Postal Service and interested mailers to work together to address the

underlying causes of the anomaly and attempt to develop a long range solution prior to the next omnibus rate proceeding. These efforts are just as likely to be successful if they proceed informally, rather than in the context of a formal quasi-judicial proceeding.

The issue of the need for conducting evidentiary hearings for the purpose of determining the appropriate effective date for postage refunds also requires careful analysis. It is a well-recognized precept of administrative law that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law. *Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (“... the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing.”).

In the instant proceeding, NFN has requested a hearing in part to “explore with the Postal Service on the record the Postal Service’s rationale with regard to granting or not granting the [postage] refunds” backdated to January 10, 1999. Tr. 1/14. NFN, and the other parties, are quite cognizant of the fact that the Commission recently held that postage refunds are considered beyond the Commission’s jurisdictional scope. See Docket No. C98-1, PRC Order No. 1227 at 7-8 (Jan. 27, 1999) (Life Time Fitness). To conduct a hearing of no legal consequence will not serve the public interest in judicial economy, and will delay implementation of any new classification language.

Furthermore, the Commission is not persuaded by NFN’s interpretation of the Life Time Fitness Order. Under NFN’s reading of the opinion, the Commission’s ruling on its authority to issue refunds was not comprehensive, but rather indicated that it would consider only those complaints clearly raising an issue that Postal Service rates or services have contravened the policies of the Postal Reorganization Act. To this end, NFN argues that the Service’s proposed classification change, with its April 9, 1999 effective postage refund date, does contravene those policies, as the Service: (1) knew about the anomaly as early as on or about February 4, 1999; and (2) has already accepted payment of the lower of the Nonprofit and Regular rates from at least one unnamed mailer prior to that April date.

The Commission finds NFN's argument flawed, for the reasons offered by the Office of Consumer Advocate. Specifically, the cited instance of a single mailer who was accorded this exceptional treatment does not rise to the level of an institutional policy discriminating against one group of Nonprofit publications in favor of another. Moreover, the two-month "delay" in the Postal Service's filing of this case after it became aware of the rate anomaly does not seem unduly long. Under these circumstances, the Commission need not reach the merits of NFN's interpretation of the Life Time Fitness decision.

Finally, the Commission must address AMMA's argument that the Nonprofit rates were invalid *ab initio*, which thereby removes the Board of Governors' exclusive discretion to determine when a rate change will be allowed, and permits the Commission to "at the very least recommend that the Governors apply the refund program retroactively, to the date the invalid rates were first applied, to reverse the effects of the invalid rates." AMMA Response at 3. AMMA generally claims that the inadvertent anomaly is at odds with the underlying principles of 39 U.S.C. § 3626 and Congressional intent to ensure that nonprofit mailers generally enjoy reduced postage rates. *Id.* at 2. It does not request an evidentiary hearing, as it maintains that the issue is a matter of law, not fact.

The Commission is in accord with AMMA that the issue is a matter of law, yet finds no legal authority cited by AMMA supporting its proposition. In this circumstance, the appropriate next step is not an evidentiary hearing, but briefs to allow participants to challenge the Service's contention that both the plain language of 39 U.S.C. § 3625(f) and the relevant case law indicate that the Commission has no authority to include as part of its recommended decision any limitation on the timing of rate implementation.

For the reasons discussed herein, the Commission grants the Postal Service's motion to proceed without evidentiary hearings in Docket No. MC99-3.

It is ordered:



The Motion of the United States Postal Service to proceed without evidentiary hearings in this docket is granted.

By the Commission.

(S E A L)

Margaret P. Crenshaw  
Secretary